In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-762

SAMUEL KRAHAM,

Appellant

versus

STATE OF FLORIDA,

Appellee

APPELLANT'S JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

SAMUEL KRAHAM,
Appellant

versus

STATE OF FLORIDA,
Appellee

Appellant, Samuel Kraham, respectfully requests this Court to review the opinions and orders of the Supreme Court of Florida, quashing those orders which reversed the trial court's holding that § 847.011, Florida Statutes (1975) was unconstitutional, and remanding the cause with directions to reinstate the trial court's dismissal of the information filed against Appellant.

OPINIONS AND ORDERS BELOW

The opinion and order of the Florida Supreme Court reversing the trial court's holding that § 847.011, Florida Statutes (1975) was unconstitutional is attached as Appendix A. 360 So. 2d 393 (Fla. 1978).

The Florida Supreme Court's subsequent order denying Appellant's Petition for Rehearing is attached as Appendix B.

The trial court's order holding § 847.011 unconstitutional is attached as Appendix C.

A certified copy of the Notice of Appeal filed in the Florida Supreme Court reversing the trial court's ruling that § 847.011 F.S. was unconstitutional was entered May 31, 1978 and became final July 31, 1978 (Appendix A and B). A Notice of Appeal was filed in the Florida Supreme Court on August 25, 1978 (Appendix D).

§ 847.011(1) (a) Florida Statute is attached as Appendix E and states in pertinent part:

> "(1) (a) A person who knowingly sells... or offers to sell...or has in his possession, custody or control with intent to sell...any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent use, or purporting to be for indecent use or purpose...is guilty of a misdemeanor of the first degree..."

The information charging Kraham with violation of § 847.011. F.S. is attached as Appendix F.

Kraham's Motions to Dismiss are attached as Appendices G, H. and I.

JURISDICTION

Jurisdiction is conferred on this Court pursuant to 28 USC 1257(2) which provides for review by this Court of final decisions of the highest state court "by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Numerous cases sustain jurisdiction. In Local 333B, UNITED MARINE DIVISION OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F.L.) v. BATTLE (DC Va. 1951), 101 F.Supp. 650, aff'd 72 S.Ct. 178, 342 U. S. 880, 96 L.Ed 661 it was held that an appeal lies to this Court from a decision of the highest court of a state upholding the validity of a state statute as against the contention that it contravenes the federal constitution. See also HUFFMAN v. PURSUE, LTD., (Ohio 1975), 95 S.Ct. 1200, 420 U.S. 593, 43 L.3d.2d482, reh.den. 95 S.Ct. 1969, 421 U.S. 971, 44 L.Ed.2d 463.

QUESTION PRESENTED

FLORIDA'S PORNOGRAPHY STATUTE MAKING IT UNLAWFUL TO SELL ANY "OBSCENE, LEWD, LASCIVIOUS, FILTHY, INDECENT, SADISTIC, OR MASHOCHISTIC" ITEM, INCLUDING A MOTION PICTURE FILM, IS UNCONSTITUTIONALLY IMPERMISSIBLE BASED UPON THE FIRST AMENDMENT, "FREE SPEECH" REQUIREMENTS AND THE FOURTEENTH AMENDMENT "DUE PROCESS" REQUIREMENTS

STATEMENT OF THE CASE

The State of Florida filed an information against Samuel Kraham, a mere clerk in an adult bookstore, for sale of "obscene, lewd, lascivious or indecent" motion picture films in violation of § 847.011 F.S. (Appendix F). Kraham, by Motions to Dismiss, raised *inter alia* the question of whether the State statute violated his due process rights under the federal constitution in that the statute was so vague and ambiguous that Kraham was unable to know what conduct was prohibited by it (Appendices G-I).

The trial court subsequently entered an order finding § 847.011 F.S. unconstitutional as being overbroad and not possible of evenhanded enforcement (Appendix C). The trial court, having found the statute unconstitutional on that ground, did not rule on the other grounds raised by Kraham. Thereafter, the State of Florida appealed to the Florida Supreme Court which upheld the constitutionality of the statute, with one Justice dissenting. The dissent stated as follows (Appendix A):

> " There are there(sic) reasons which persuade me that this criminal prosecution is unconstitutionally impermissible:
>
> (1) This statute regulates expression and implicates first amendment values. However distateful these materials are to some, they are nonetheless a form of communication and entertainment acceptable to a substantial segment of societies; otherwise they would have no value in the market place;
>
> (2) The statute is predicated on the somewhat illogical premise that a person may be prosecuted

> criminally for providing another with materials he has a constitutional right to possess;
>
> (3) The present constitutional standards both substantive and procedural which apply to these prosecutions are so intolerably vague that even-handed enforcement of the law is a virtual impossibility.

It is interesting to note that the community standards' test as set forth by the Supreme Court had been declared void for vagueness in *Connally v. General Const. Company*, 269 U.S. 385, 46 S. Ct. 126, 70 L. 2d 322 (1926), in a case involving application of the minumum wage law, where the minimum wage was to be set by contemporary community standards. The court stated that men of common intelligence must necessarily guess at it's meaning or differ as to its' application and that the statute violated the first essential of due process of law because it lacked any ascertainable standard of guilt.

The Constitution protects the right to receive information and ideas regardless of their social worth. Where material is being distribued to a willing adult and is not designed or intended for minors or obtrusively forced upon unwilling recipients, there is no substantial governmental interest which would justify shutting off all avenues for the willing adult to obtain the material the constitution states he has a right to possess. The state's power to proscribe obscenity as constitutionally unprotected, could not be exercised in this case where the book was sold to a consenting adult and was not thrusted upon the general public.

Stanley v. Georgia, 394 U.S. 557, 12 L.Ed.2d 542 89 S.Ct. 1243."

It is from the Florida Supreme Court's upholding of the validity of §847.011 that Samuel Kraham appeals.

SUBSTANTIAL FEDERAL QUESTION

Kraham, a mere clerk in a bookstore, may be imprisoned for selling a movie which had never been declared obscene. As stated by Justice Douglas in MILLER v. CALIFORNIA, 413 U.S., 15 at 44:

> " Obscenity -- which even we cannot define with precision -- is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a National dedicated to fair trials and due process."

This Court has worked hard to define obscenity, but concededly has failed. Beginning with ROTH v. UNITED STATES, 354 US 476 1 L.Ed.2d 1498, 77 S.Ct. 1304, this Court ruled that "obscene material is material which deals with sex in a manner appealing to prurient interest". Obscenity, it was said, was rejected by the First Amendment because it was "utterly without redeeming social importance." The presence of an "prurient interest" was to be determined by "contemporary community standards." That test, it has been said, could not be determined by one standard here and another there, *Jacobellis v. Ohio*, 378 U.S. 184, 194 12 L.Ed.2d 793, 84 S.Ct. 1676 but "on the basis of a national standard." In *Jacobellis*, Justice Stewart commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to

define what may be indefinable."

In MEMOIRS v. MASSACHUSETTS, 383 U.S. 413, 418, 16 L.Ed.2d 1, 86 S.Ct. 975, the Roth test was elaborated as follows: "[T]hree elements must coalesce: it must be established that: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and; (c) the material is utterly without redeeming social value."

Because of a divergence of opinion on the Court, this Court began the practice in REDRUP v. NEW YORK, 386 U. S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), of per curiam reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.

Thereafter, MILLER v. CALIFORNIA, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1972) added a new three-pronged test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and; (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientifiv value."

Notwithstanding the evolving standares from ROTH to MILLER, the vagueness of the applicable standard at any one point in time has produced a serious problem of providing adequate notice to persons who are engaged in conduct which a state statute could be thought to prohibit. The Due

Process Clause of the Fourteenth Amendment unequivocally requires that all criminal laws provide fair notice of "what the State commands or forbids." LANZETTA v. NEW JERSEY, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.888 (1939). In the present case, applying the "community standards" test set forth in MILLER, *supra*, to the statute in question, it is evident that the statute fails to provide adequate notice of exactly what is prohibited.

One important case on notice, relied upon in the trial court and in the dissent in the Florida Supreme Court below, is CONNALLY v. GENERAL CONSTRUCTION COMPANY, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed 322 (1926). That case involved a suit to enjoin enforcement of a statute which made it a penal offense for paying "less that the current rate of pay per diem wages in the locality where the work is performed" to laborers, workmen, mechanics, prison guards, janitors in public institutions or other persons so employed by or on behalf of the state. The constitutional ground of attack was denial of due process in violation of the Fourteenth Amendment; that the statute contained no ascertainable standard of guilt; that it could not be determined with any degree of certainty what sum constituted a current wage in any locality; and that the term "locality" itself was fatally vague and uncertain.

This Court held, in CONNALLY that the terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Whether a statute is lacking in certainty turns on whether it employs words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly

apply it or to ascertain a standard of some sort. This Court stated:

> "The Cohen grocery Case involved the validity of section 4 of the Food Control Act of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 1/8ff), which imposed a penalty upon any person who should make 'any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries.' It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific definite act.
>
> Among the cases cited in support of that conclusion is United States v. Capital Traction Co., 34 App. D.C. 492, Ann.Cas.68, where a statute making it an offense for any street railway company to run an insufficient number of cars to accomodate passengers 'without crowding' was held to be void for uncertainty. In the course of its opinion, that court said (page 596,598):
>
> 'The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accomodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another.***There is a total absence of any definition of what shall constitute a crowded

car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.'

> * * *The dividing line between what is lawful unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.' "

In CONNALLY this court applied the above cases and found that the statute in question was unconstitutional since it presented a double uncertainty as to the meaning of "current rate of wages", which could vary, and as to the meaning of "locality". As in CONNALLY, in the present case, applying the community standards test to Florida's statute presents an uncertainty as to what the community standard is, and what conduct the statute prohibits as being obscene.

In line with the above cases, this Court has repeatedly held that the definition of obscenity must provide adequate notice of exactly what is prohbited from dissemination. See, e.g., RABE v. WASHINGTON, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972); INTERSTATE CIRCUIT, INC. v. DALLAS, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); WINTERS v. NEW YORK, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948). However, it goes without saying that there cannot be adequate notice of what is obscene when obscenity has not been adequately defined. As stated by Justice Black:

> "[a]fter the fourteen separate opinions handed down" in the trilogy of cases decided in 1966, that 'no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' . . . .' Ginzburg v. United States, 383, U.S., at 480--481, 86 S.Ct., at 952-953 (dissenting opinion)

As Mr. Chief Justice Warren pointed out, "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." UNITED STATES v. HARRISS, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

IN GINZBURG v. UNITED STATES, 383 U.S. 463, 86

S.Ct. 942, 16 L.Ed.2d 31, Mr. Justice Black said in dissent, "...Ginzburg...is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal." That observation by Mr. Justice Black is underlined by the fact that the Ginzburg decision was five to four.

In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. The insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ookselling . . . a hazardous profession," GINZBERG v. NEW YORK, supra, 390 U.S., at 674, 88 S.Ct., at 1298 (Fortas, J., dissenting), but as well because it invites arbitrary and erratic enforcement of the law. See, e.g., PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

In the present case, the trial court found Florida's pronography statute unconstitutional. The Florida Supreme Court reversal. It is submitted that the issue presented clearly constitutes a substantial federal question that must once again be reviewed by this Court.

CONCLUSION

Based upon the foregoing, Kraham respectfully submits he has sufficiently demonstrated that this Court has juris-

diction to hear the merits of this appeal.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing has been mailed to: BASIL S. DIAMOND, 225 Pan American Building, West Palm Beach, FL 33401 , Attorney for Appellee, this 6th day of November, 1978.

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APPENDIX A

OPINION AND ORDER OF THE FLORIDA SUPREME COURT REVERSING THE TRIAL COURT'S ORDER HOLDING §847.011, FLORIDA STATUTES, UNCONSTITUTIONAL

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D., 1978

Received June 5, 1978

STATE OF FLORIDA Appellant	*	
v.	*	Case No. 52,697
SAMUEL KRAHAM Appellee.	*	County Court Case No. 77-1685MM

* * * * * * * * * * * * * * * * * * *

Opinion filed May 31, 1978

An Appeal from the County Court in and for Palm Beach County, C. Michael Shalloway, Judge

Robert L. Shevin, Attorney General, Tallahassee; and Basil S. Diamond, Assistant Attorney General, West Palm Beach, Florida, for Appellant

Allan L. Hoffman, West Palm Beach, Florida, for Appellee

HATCHETT, J.

We must determine whether Section 847.011, Florida Statutes (1975) which makes unlawful the sale of obscene material is so inconsistent with the right to privately possess obscene material, as expressed in *Stanley v. Georgia*, 89 S. Ct. 1243 (1969) as to render the statute unconstitutional. We have jurisdiction under Article V, Section 3(b) (1), Florida Constitution. We hold the statute to be constitutional.

The appellee, Samuel Kraham, was charged by information with two counts of selling obscene motion pictures in violation of Section 847.011, Florida Statutes (1975). After entering a plea of not guilty, he moved to dismiss the information. After several hearings the trial court granted the appellee's motion citing *Stanley v. Georgia*, supra, and stating:

> A regulation that criminally punishes one for providing that citizen with material he has a Constitutional right to possess is illogical and arbitrary [see dicta by Mr. Justice Stevens at page 996 of 97 S.Ct. (1977)]. The Legislature could enact laws specific enough to accomplish the regulation it has a right to impose. The present law is overbroad for that purpose. Evenhanded enforcement of F.S. 847.011 is not possible and therefore is contrary to the Constitution; . . ."

At about the time the trial judge entered his order, this court filed its opinion in *Johnson v. State*, 351 So.2d 10 (Fla. 1977), holding the statute to be constitutional. Since

our consideration on the overbreadth issue of this statute is so recent, we see no reason to again set forth our reasons for upholding its constitutionality.

Accordingly, the order of the trial court is reversed and the case remanded.

It is so ordered.

OVERTON, C.J., BOYD and ENGLAND, JJ., Concur
ADKINS, J., Dissents with an opinion

ADKINS, J., Dissenting:

The order of the trial court granting the Motion to Dismiss containg the following:

> "Like it or not, mere private possession of obscene material is not a crime [Stanley v. Georgia - 89 S.Ct. 1243 (1969)]. The State has legitimate and broad power to regulate the public dissemination of obscene materials [Roth v. U.S. 775 S.Ct. 1304 (1957)].
>
> All powers of regulation are to some extent prohibitory in the sense that acts may be precluded from performance except when done in compliance with standards assuring the preservation of public health, safety, or welfare.
>
> It then follows that a regulation may only be imposed upon a free people if it is not arbitrary and is founded upon, directly related to, and necessary for preserving the public health, safety, or welfare.

Regulations to assure that obscene materials do not fall into the hands of impressionable youngsters not mature enough to form proper judgments or persons mentally deficient to the extent they are incapable of controlling their actions, all can be justified against a charge of arbitrariness. Regulations which prevent forcing persons who desire not to view obscene materials from viewing them can also be so justified. The free, stable, mature citizen who does desire to view obscene material has that right under the Stanley v. Georgia decision cited above. A regulation that criminally punishes one for providing that citizen with material he has a Constitutional right to possess is illogical and arbitrary [see dicta by Mr. Justice Stevens at page 996 of 97 S.Ct. (1977)]. The Legislature could enact laws specific enough to accomplish the regulation it has a right to impose. The present law is overbroad for that purpose. Evenhanded enforcement of F. S. 847.011 is not possible and therefore is contrary to the Constitution."

At present, the controlling case for the definition of obscenity is *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S.Ct. 2607 (1972), this was a 5 to 4 decision that overruled or clarified *Roth v. U.S.*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). From *Roth* in 1957 until *Miller* in 1972, the majority of the court could not agree on a standard to determine what constitutes obscene material subject to regulation under the state's police power.

Miller set forth a few plain examples of what the state's statute could define for regulation. The guidelines are (a) whether the average person, applying contemporary community standards would find that the work taken as a whole,

appeals to the prurient interest, (b), whether the work depicts or described in a patently offensive way, sexual conduct specifically defined by the applicable state law; (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

It is interesting to note that in *Miller* 4 members of the court felt that it would be impossible to draft a statute that would not be void for vagueness and violate due process and equal protection.

The record in this case indicates that the person purchasing the material was a police officer; there is no allegation that he was offended by the material; and there is no allegation regarding which section of *Florida Statute 847.011* has been violated.

There are three reasons which pursuade me that this criminal prosecution is constitutionally impermissible:

(1) This statute regulates expression and implicates first amendment values. However distasteful these materials are to some, they are nonetheless a form of communication and entertainment acceptable to a substantial segment of societies; otherwise they would have no value in the market place;

(2) The statute is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with materials he has a constitutional right to possess;

(3) The present constitutional standards both substantive and procedural which apply to these prosecutions are so intolerably vague that evenhanded enforcement of the law

is a virtual impossibility.

It is interesting to note that the community standards' test as set forth by the Supreme Court had been declared void for vagueness in *Connally v. General Const. Company*, 269 U.S. 385, 46 S. Ct. 126, 70 L. 2d 322 (1926), in a case involving application of the minimum wage law, where the minimum wage was to be set by contemporary community standards. The court stated that men of common intelligence must necessarily guess at its' meaning or differ as to its' application and that the statute violated the first essential of due process of law because it lacked any ascertainable standard of guilt.

The Constitution protects the right to receive information and ideas regardless of their social worth. Where material is being distribued to a willing adult and is not designed or intended for minors or obtrusively forced upon unwilling recipients, there is no substantial governmental interest which would justify shutting off all avenues for the willing adult to obtain the material the constitution states he has a right to possess. The state's power to proscribe obscenity as constitutionally unprotected, could not be exercised in this case where the book was sold to a consenting adult and was not thrusted upon the general public. *Stanley v. Georgia*, 394 U.S. 557, 22 L. Ed. 2d 542 89 S. Ct. 1243.

I would affirm the trial court.

APPENDIX B

ORDER OF THE FLORIDA SUPREME COURT DENYING PETITIONER'S PETITION FOR REHEARING

IN THE SUPREME COURT OF FLORIDA
MONDAY, JULY 31, 1978

STATE OF FLORIDA,
Appellant — CASE NO.52,697

vs.

SAMUEL KRAHAM,
Appellee — County Court Case No. 77-1685 MM

On consideration of the motion for rehearing filed by attorney for appellee, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ENGLAND, C.J., BOYD, OVERTON and HATCHETT, JJ., Concur
ADKINS, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: s/ Debbie Causseaux
Deputy Clerk

CC: Hon. John G. Dunkle, Clerk
Hon. C. Michael Shalloway, Judge
Allan L. Hoffman, Esquire
Robert L. Bogen, Esquire

APPENDIX C

OPINION AND ORDER OF THE TRIAL COURT HOLDING §847.011, FLORIDA STATUTE, UNCONSTITUTIONAL

IN THE COUNTY COURT IN AND FOR PALM BEACH COUNTY, FLORIDA . . . .CRIMINAL DIVISION.

Case No. 77-1685 MM

Received: Oct. 20, 1977

STATE OF FLORIDA)
)
vs.)
)
SAMUEL KRAHAM,)
Defendant)

ORDER

THIS CAUSE came before the Court upon defendant's motion to dismiss, filed June 14, 1977.

Like it or not, mere private possession of obscene material is not a crime [Stanley v. Georgia - 89 S. Ct. 1243 (1969)]. The State has legitimate and broad power to regulate the public dissemination of obscene materials [Roth v. U. S. - 775 S.Ct. 1304 (1957)].

All powers of regulation are to some extent prohibitory in the sense that acts may be precluded from performance

except when done in compliance with standards assuring the preservation of public health, safety, or welfare.

It then follows that a regulation may only be imposed upon a free people if it is not arbitrary and is founded upon, directly related to, and necessary for preserving the public health, safety, or welfare.

Regulations to assure that obscene materials do not fall into the hands of impressionable youngsters not mature enough to form proper judgments or persons mentally deficient to the extent they are incapable of controlling their actions, all can be justified against a charge of arbitrariness. Regulations which prevent forcing persons who desire not to view obscene materials from viewing them can also be so justified. The free, stable, mature citizen who does desire to view obscene material has that right under the Stanley v. Georgia decision cited above. A regulation that criminally punishes one for providing that citizen with material he has a Constitutional right to possess is illogical and arbitrary [see dicta by Mr. Justice Stevens at page 996 of 97 S.Ct. (1977)]. The Legislature could enact laws specific enough to accomplish the regulation it has a right to impose. The present law is overbroad for that purpose. Evenhanded enforcement of F.S. 847.011 is not possible and therefore is contrary to the Constitution; accordingly, it is

ORDERED, that the defendant's motion to dismiss is granted.

DONE AND ORDERED this 19th day of October, A.D. 1977, at West Palm Beach, Florida.

s/ C. Michael Shalloway,
C. Michael Shalloway,
Judge

Copies Furnished:

Allan L. Hoffman, Esq.
Attorney for Defendant

State Attorney's Office

APPENDIX D

NOTICE OF APPEAL

IN THE SUPREME COURT OF FLORIDA

CASE NO: 52,697

STATE OF FLORIDA,
Appellant

v.

SAMUEL KRAHAM,
Appellee.

NOTICE OF APPEAL

APPELLEE, SAMUEL KRAHAM, hereby appeals to the United States Supreme Court the decision of this Court dated May 31, 1978 and the Order denying Petition for Rehearing dated July 31, 1978. Jurisdiction is invoked pursuant to 28 USC, §1257(2).

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: BASIL S. DIAMOND, 225 Pan American Building, West Palm Beach, FL 33401, Attorney for Appellant, this 23rd day of AUGUST, 1978.

s/ Edna L. Caruso
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and

ALLAN L. HOFFMAN
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Attorneys for Appellee

A TRUE COPY
Attest:
SID J. WHITE, Clerk
Supreme Court of Florida

By: Debbie Causseaux
Deputy Clerk

(S E A L)

APPENDIX E

§847.011, FLORIDA STATUTES

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent use, or purporting to be for indecent use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased,

obtained, or had; or who in any manner knowingly, hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

APPENDIX F

INFORMATION

IN AND FOR PALM BEACH COUNTY,
STATE OF FLORIDA

WINTER Term, in the year of our Lord, one thousand nine hundred and SEVENTY SEVEN

STATE OF FLORIDA — INFORMATION FOR
vs. — SALE OF OBSCENE MOTION PICTURES
SAMUEL KRAHAM — (2 COUNTS)

In the Name and by Authority of the State of Florida:

BARRY M. COHEN Assistant State's Attorney of the Fifteenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Palm Beach, under oath information makes that SAMUEL KRAHAM of the County of Palm Beach and State of Florida, on the 2nd day of MARCH in the year of our Lord, one thousand nine hundred and SEVENTY SEVEN in the County and State aforesaid, did unlawfully and knowingly sell to JAMES NAZZARO, an obscene, lewd, lascivious or indecent motion picture film entitled Stars of Sex Series II "The Ravaging Mob SS14" the dominant theme of said motion picture film taken as a whole; appeal to the prurient interest in sex in that said film depicts or describes in a patently offensive way, sexual conduct, to-wit: patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated or patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibi-

tion of the genitals, and that said film taken as a whole, lacks serious literary, artistic, political, or scientific value, contrary to Florida Statutes 847.011.

COUNT TWO

Informant aforesaid, under oath, further information makes that SAMUEL KRAHAM on the 2nd day of MARCH, 1977 in the County of Palm Beach and State of Florida, did unlawfully and knowingly sell to JAMES NAZZARO, an obscene, lewd, lascivious or indecent motion picture film entitled "Swedish Erotics #81", the dominant theme of said motion picture film taken as a whole; appeals to the prurient interest in sex in that said film depicts or describes in a patently offensive way, sexual conduct, to-wit: patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated or patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals, and that said film taken as a whole, lacks serious literary, artistic, political, or scientific value, contrary to Florida Statutes 847.011,

JW/bjm

APPENDIX G

MOTION TO DISMISS

IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA.
CRIMINAL DIVISION.

CASE NO: 77-1685-MM-AO2

Filed: April 19, 1977

STATE OF FLORIDA

vs.

SAMUEL KRAHAM,
Defendant

MOTION TO DISMISS

The defendant by and through his undersigned attorney moves this Court for an order dismissing the information filed herein and as grounds for said motion which show unto the Court that the type of film that is alleged to have been sold in the information has been ruled not to be obscene by juries in Palm Beach County, Florida in previous cases and that the type of conduct depicted therein does not violate the community standards of Palm Beach County, Florida.

As further grounds the defendant would show unto the Court that the statute provides a test for obscenity that is not consistent with the decisions of the United States Supreme Court, and that as such the statute is void as not providing the proper test for obscenity.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the STATE ATTORNEY, Palm Beach County Courthouse, West Palm Beach, Florida 33401, by hand, this 18 day of April, 1977.

ALLAN L. HOFFMAN
Attorney for Defendant
509 North Dixie Highway
West Palm Beach, Florida
33401
Phone: (305) 659-7666

By s/ Allan L. Hoffman
Allan L. Hoffman

4-15-77
76-234

APPENDIX H

MOTION TO DISMISS

IN THE COUNTY COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION.

CASE NO: 77-1685-MM-AO2

STATE OF FLORIDA

vs.

SAMUEL KRAHAM
Defendant

MOTION TO DISMISS

The defendant by and through his undersigned attorney moves this Court for an order dismissing the information filed herein and as grounds for said motion would show unto the Court that the information and the statute cited therein 847.011 is so vague and ambiguous that the defendant is unable to know what conduct is prohibited by the statutes and is unable to prepare a proper defense based on this ambiguity.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to the STATE ATTORNEY, Palm Beach County Courthouse, West Palm Beach, Florida, 33401 this 13th day of April, 1977.

ALLAN L. HOFFMAN
Attorney for Defendant
509 North Dixie Highway
West Palm Beach, Florida
33401
Phone: 305 - 659-7666

By: s/ Allan L. Hoffman
Allan L. Hoffman

4-12-77
76-234

APPENDIX I

MOTION TO DISMISS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CRIMINAL DIVISION

Filed: June 14, 1977

CASE NO: 77-1685-MM

STATE OF FLORIDA

vs. CJS

SAMUEL KRAHAM
Defendant

MOTION TO DISMISS

The defendant by and through his undersigned attorney hereby moves this Court for an order dismissing the information filed herein and as grounds for said motion would show unto the Court that the defendants are charged with a crime of Sale of Material which the Supreme Court has ruled individuals have a right to possess and by prosecuting the defendant under these statutes violates his right of due process and freedom of expression under the first and fourteenth amendments to the Federal Constitution. Stanley V. Georgia 394 U.S. 557.

I HEREBY CERTIFY that a true copy of the foregoing

was furnished by mail this 14th day of June, 1977 to: STATE ATTORNEY, Palm Beach County Courthouse, West Palm Beach, Florida 33402.

ALLAN L. HOFFMAN
Attorney for Defendant
509 North Dixie
West Palm Beach, Florida
33401
(305) 659-7666

By: s/ Allan L. Hoffman
ALLAN L. HOFFMAN

6-13-77
76-234

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-762

SAMUEL KRAHAM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM

JIM SMITH
Attorney General

CHARLES W. MUSGROVE
Assistant Attorney General

225 Pan American Building
West Palm Beach, Florida 33401

Counsel for Appellee

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-762

SAMUEL KRAHAM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, by and through its undersigned attorney, respectfully moves this Court to dismiss this appeal on grounds that no substantial federal question is properly before this Court at this time, in view of the inadequate factual record.

Alternately, Appellee moves this Court to affirm the judgment below on grounds that Section 847.011 Fla. Stat. is constitutional.

The Factual Record

Though Appellant characterizes himself as a "mere" clerk, there is no basis in the record for his implication that he was aught but a knowledgeable dealer in pornographic materials, thus eviscerating any vagueness claim, as in Footnote 5, Mishkin v. New York, 383 U.S. 502 at 507 (1966). If and when this case goes to trial, it will be the State's burden to prove Appellant's guilty knowledge, as required by the statute and Johnson v. State, 351 So.2d 10 (Fla. 1977). Until then, only the facial validity of Section 847.011 Fla. Stat. is in issue.

This Court may technically have jurisdiction of the ruling on facial

validity, but it has consistently refused to exercise it absent a setting against which to weigh the effect on Appellant of the alleged constitutional issue. In Socialist Labor Party v. Gilligan, 406 U.S. 583 at 588 (1972), this Court dismissed an appeal, saying:

> "The long and the short of the matter is that we know very little more about the operation of the Ohio affidavit procedure as a result of this lawsuit than we would if a prospective plaintiff who had never set foot in Ohio had simply picked this section of the Ohio election laws out of the statute books and filed a complaint in the District Court setting forth the allegedly offending provisions and requesting an injunction against their enforcement. These plaintiffs may well meet the technical requirement of standing, and they may be parties to a case or controversy, but their case has not given any particularity to the effect on them of Ohio's affidavit requirement.
>
> "This Court has recognized in the past that even when

> jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in cleancut and concrete form.' Rescue Army v. Municipal Court, 331 U.S. 549, 584, 91 L.Ed. 1666, 1686, 67 S.Ct. 1409 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. Id., at 574, 91 L.Ed. at 1681." at 588

The Florida Supreme Court is firmly committed to the doctrine of construing statutes in such a manner as to save constitutionality. See e.g. State v. Reese, 222 So.2d 732 at 735 (Fla. 1969). Whether any such construction is necessary here which might affect Appellant's case is as yet unknown. Thus, pertinent here is Cardinale v. Louisiana, 394 U.S. 437 at 439 (1969), where this Court rejected an issue raised initially before this Court, noting:

> "* * * Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.* * *."

The record herein is no better than if the issue had never been raised.

This Court has always placed great reliance on the construction given state statutes by the highest state court, and has been careful to place its constitutional rulings in proper factual perspective. See e.g. Street v. New York, 394 U.S. 576 (1969). Neither is possible here, so this Court should decline review.

The Vagueness Claim and Notice

Facially, 847.011 Fla. Stat. can hardly be too vague. In Rhodes v. State, 283 So.2d 351 (Fla. 1973), the statute was construed to include this Court's definition in Miller v. California, 413 U.S. 15 (1973). In Miller, supra, this Court stated:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

In like manner, the adoption of Miller's standards for Florida eliminates any impermissible need to guess at what conduct is prohibited.

That Appellant relies so heavily on dissenting opinions in the cited obscenity cases demonstrates the absence of a substantial federal question. This Court has upheld statutes like 847.011 Fla. Stat. repeatedly. Though a person may not know for a certainty whether material is in fact obscene before trial, absolute precision has never been required. As elucidated in Footnote 10 of Miller, supra,

> "Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'

> United States v. Petrillo, 332 U.S. 1, 7-8 (91 L.Ed. 1877, 67 S.Ct. 1538). These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries to fairly administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . .' Id., at 7 (91 L.Ed. 1877).

Appellant has no reason to claim lack of notice. The statute has been authoritatively construed not only as to the test of obscenity [Rhodes v. State, supra], but also to the appropriate community [Davison v. State, 288 So.2d 483 (Fla. 1973)], and as to the requirement of scienter

[Johnson v. State, supra]. As thus authoritatively construed, the statute passes muster just as did the New York law approved in Mishkin v. New York, supra.

The Right to Private Possession

The central issue in the Florida courts has been the right to sell to adults who, admittedly under Stanley v. Georgia, 394 U.S. 557 (1969), have the right to private possession. That the protection of Stanley v. Georgia, supra, does not extend anywhere outside the home is most clearly reflected in United States v. Orito, 413 U.S. 139 at 141-143 (1972).

The Florida County Judge was wrong to conclude as he did that the right to possession of obscene materials created a correlative right to sell obscene materials. The Florida Supreme Court correctly

reversed that decision, and this Court should affirm the result.

CONCLUSION

Both because this Court does not yet have a factual setting against which to weigh this case, and because the Florida Supreme Court correctly assessed the facial validity of Section 847.011 Fla. Stat., this Court should either dismiss the instant appeal, or affirm the result.

Respectfully submitted,

JIM SMITH
Attorney General

CHARLES W. MUSGROVE
Assistant Attorney General

225 Pan American Building
West Palm Beach, Florida

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss or Affirm has been furnished to Edna L. Caruso, Esquire, Suite 1007, Forum III, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, and to Allan L. Hoffman, Esquire, 509 North Dixie Highway, West Palm Beach, Florida 33401, by mail, this day of January, 1979.

CHARLES W. MUSGROVE
Assistant Attorney General

Counsel for Appellee